UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PATRISH, LLC, d/b/a NORTHWEST
AIRPORT INN

and Case No. 14-CA-080874

UNITE HERE LOCAL 74

Rochelle K. Balentine and Lynette K. Zuch, Esqs.
for the General Counsel.
Tedrick Housh, III (Lathrop & Gage LLP, Kansas City, Missouri)
for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in St. Louis, Missouri on August 27, 2012. The Charging Party, UNITE HERE Local 74, filed the initial charge in this matter on May 11, 2012 and an amended charge on July 30, 2012.[1] The General Counsel issued the complaint on July 30, 2012, alleging that Respondent, Patrish, LLC, doing business as the Northwest Airport Inn, violated Section 8(a)(5) and (1) of the Act. More specifically, he alleges that Respondent violated the Act by refusing to negotiate for a successor collective bargaining agreement to the contract which expired on November 29, 2011. The General Counsel also alleges that Respondent violated the Act by subcontracting all unit work, terminating the only 2 bargaining unit members in its employ and withdrawing recognition of the Charging Party Union as the exclusive representative of the bargaining unit.

[1] Respondent appears to have abandoned the argument that the allegations of the complaint are barred by Section 10(b) of the Act, with prohibits the issuance of a complaint based upon an unfair labor practice occurring more than six months prior to the filing of the charge. In any event, the May 11, 2012 initial charge was filed within six months of the earliest alleged violation (November 21, 2011). The July 30 amended charge is sufficiently related to the initial charge to satisfy the six-month limitation of Section 10(b), *Redd-I, Inc,* 290 NLRB 1115 (1988). The initial charge alleges the Respondent violated Section 8(a)(5) and (1) on November 21, 2011 by refusing to bargain. The amended charge merely fills in the details on that alleged refusal (i.e., withdrawal of recognition; termination of all bargaining unit employees, the unilateral subcontracting of unit work, etc.).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. JURISDICTION

Respondent, Patrish, LLC, doing business as Northwest Airport Inn, is a corporation, which operates an extended stay hotel near the St. Louis, Missouri Airport. In the 12 months prior to June 30, 2012, Respondent purchased and received goods and/or services valued in excess of $50,000 from points outside of Missouri. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent purchased the Northwest Airport Inn in 2002. The Charging Party Union, UNITE HERE Local 74, had represented employees at this hotel since at least 1991. The parties have had a number of collective bargaining agreements. The most recent contract was effective between November 30, 2010 and November 29, 2011.

On January 27, 2010, Respondent notified its guests that in order to maintain its room rates it was eliminating weekly housekeeping services. Guests were informed that they could exchange their linen and towels at the hotel's front desk. Guests were also informed that Respondent would no longer be cleaning their rooms once a week. Instead, one of Respondent's employees would inspect each guest's room once a week to insure that the room was maintained properly, R Exh. 1.

As a result of this change in its business model, Respondent laid off 4 of its housekeeping employees. These employees were not replaced. In February 2010, there was a fire at the hotel which damaged 30 of the hotel's 187 rooms. The relevance of the fire to the instant case is unclear. Later in 2010, Respondent laid off a laundry worker and subcontracted his tasks. There is no credible evidence that Respondent informed the Union of any lay-offs that occurred prior to November 2011 until some months after they occurred. However, I infer that Union benefit funds were notified when employees were terminated, or at least should have noticed when benefit payments ceased. In any event, a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time, *Owens-Corning Fiberglass,* 282 NLRB 609 (1987). Thus, the Union did not waive its bargaining rights regarding the lay-offs and subcontracting of unit work in November 2011 by virtue of its acquiescence to the prior lay-offs and subcontracting.

By the time the 2010-2011 collective bargaining agreement was signed in November 2010, the bargaining unit consisted of just two employees, an inspectress, Tamera Poetting, and a houseman, Gary Wohldman. Poetting's job included inspecting each guest room once a week, cleaning vacant rooms, vacuuming the halls and cleaning the windows. Wohldman's job was to remove trash from locations in which it was placed by guests and taking the trash to a dumpster,

shampooing rugs, mopping floors, servicing the hotel's elevator and manning the linen station. The Union appears to have little or no contact with Respondent or bargaining unit employees between the signing of the collective bargaining agreement in January 2011 and November 2011.

Union Business Agent/Vice President Harry Moore apparently notified Respondent that the Union wished to reopen the contract 60 days prior to the November 29, 2011 expiration date, as provided in the collective bargaining agreement, Tr. 90-91, G.C. Exh. – 2, Article 23. On November 21 or 22, 2011 Moore went to the hotel and met with Owner Naresh Patel and General Manager William Thompson. Moore presented Respondent with the Union's proposal for an agreement running from November 30, 2011 through November 29, 2012. The proposal called for a 30 cent per hour raise for unit employees, as well as increases in the Employer's contribution to the Union's health and welfare and pension funds, GC Exhs. 2 and 3.

Patel and/or Thompson responded by telling Moore that Respondent had contracted out the work of the bargaining unit employees and was going to lay-off both of them, Tr. 93.[2] Moore told Respondent's representatives that they could not do that and he was going to file an unfair labor practice charge. At the end of the workday on November 29, Bill Thompson informed Poetting and Wohldman that they were being laid off. Employees of Southside Temporary

[2] I credit Moore's testimony in this regard. Thompson does not recall meeting with Moore regarding the collective bargaining agreement. However, Patel confirms that Thompson was present at the meeting with Moore, Tr. 75, 32. Patel's testimony at hearing was inconsistent and inconsistent with statements made under oath in his affidavit. Therefore, his testimony that he had not decided to contract out the bargaining unit work prior to the November 2011 meeting with Moore and his testimony denying that he told Moore at the November meeting that he had already subcontracted the work of the two remaining bargaining unit employees, is not credible. For example, Patel stated or testified:

Q. When the contracts came up for renewal in November of 2011, you had already subcontracted out the remaining work to Southside; isn't that correct?
A. That's correct. Tr. 26.

"Union Rep Moore never gave any concessions at any time in the past in his contract negotiations." But that did not matter in this situation because we had already hired other people to subcontract out the work and our cost structure was already laid out, Tr. 31.

In his affidavit, Moore stated:

"I told him Harry, we don't have any need for Union employees because it is all subcontracted out. We are not going to sign the contract agreement." Tr. 42.

"To us it didn't make a difference whether Union Rep Moore wanted an increase or a decrease in pay because the decision had been made to subcontract out the work." Tr. 47.

"So when the contract came up for renewal in 2011, all the jobs had already been subcontracted out. The union rep wanted us to sign a new agreement, and we refused because there was nothing for union employees to do there. There was (sic) no positions left; they had been subcontracted out to Southside." Tr. 69.

began performing the exact same tasks as Poetting and Wohldman almost immediately, if not immediately.

Southside Temporaries had apparently provided Respondent with employees to do work not covered by the collective bargaining agreement sometime prior to July 21, 2011. On that date, Southside provided Respondent with quotes for housekeeping, laundry service and maintenance employees, GC Exh. 3.

Analysis

A decision to subcontract bargaining unit work is a mandatory subject of bargaining where the employer is merely replacing employees in the bargaining unit with employees of an independent contractor to do the same work under similar working conditions, *Fireboard Paper Products Corp. v. NLRB,* 379 US 203 (1979); *Sunoco, Inc.,* 349 NLRB 240, 244-45 (2007). Subcontracting bargaining unit work in such circumstances, without providing sufficient notice and an opportunity to request bargaining over the decision to subcontract is generally a violation of Section 8(a)(5) and (1) of the Act.

Respondent presented the Union with a "fait accompli."

Respondent contends that it satisfied its bargaining obligations with respect to the subcontracting of unit work. Additionally, it argues that the Union waived its bargaining rights with regard to this matter.

The General Counsel argues that Respondent failed to provide sufficient notice and instead presented the Union with a "fait accompli" which precludes a finding that the Union waived its bargaining rights, *Pontiac Osteopathic Hospital,* 336 NLRB 1021, 1023-24 (2001); *UAW-Daimler Chrysler National Training Center,* 341 NLRB 431, 433-34 (2004).

I conclude that Respondent presented the Union with a "fait accompli." Owner Patel in his affidavit, which I find to be accurate, stated that it made no difference whether the Union wanted an increase or decrease in employees' compensation in bargaining because the decision had already been made to subcontract all the unit work to Southside. Further, I conclude that the decision to subcontract this work had already been implemented. I do not credit Mr. Patel's testimony at Tr. 60-61 that unit employees' tasks were not performed for a period of as much as 10 days. The suggestion that Respondent, for example, allowed residents' trash to simply pile up for ten days is not credible. I infer that Southside's employees began performing unit tasks immediately following the lay off. Thus any attempt by the Union to negotiate the terms and conditions of unit employees would have been fruitless. This establishes a violation of Section 8(a)(5) and (1) unless the Union waived its right to bargain in its 2010-11 collective bargaining agreement, *Brannen Sand and Gravel,* 314 NLRB 282 (1994).

The Union did not waive its bargaining rights over the subcontracting of unit work.

To be effective, a waiver of statutory bargaining rights must be clear and unmistakable. Wavier can occur in any of three ways, by express provision in a collective bargaining

agreement, by the conduct of the parties, (including past practices, bargaining history and action or inaction) or by a combination of the two, *American Diamond Tool,* 306 NLRB 570 (1992).

Respondent contends that the Union waived its right to bargain over the subcontracting of unit work in the 2010-2011 contract. Article 2, Section 4 of that agreement provides:

> From time to time the Company shall hire outside contractors and employees of such contractors shall not be under the jurisdiction of the Union, GC Exh. 2, p. 2.

I agree with the General Counsel that the phrase "from time to time" suggests that the parties agreed that Respondent was entitled to employ workers on a temporary basis, or for tasks unrelated to those performed by bargaining unit members, without these employees becoming part of the bargaining unit. This language does not clearly suggest that Respondent was entitled to permanently replace unit employees with contractor employees.

Article 4, the Management Rights Clause, provides;

> The management of the business and the direction of the working forces, including the right to plan, direct and control store operations, hire, suspend or discharge for proper cause, transfer or relieve employees from duty because of lack of work or for other legitimate reasons, the right to study or introduce new or improved production methods or facilities, and the right to establish and maintain reasonable rules and regulations covering the operations of the stores, a violation of which shall be among the causes for discharge, are vested in the Company, provided, however, that this right be exercised with due regard to the rights of the employees, and provide further that it will not be used for the purpose of discrimination against any employee. This paragraph is subject to the arbitration procedure.

This article does not clearly vest in Respondent the right to replace all unit employees with contract employees without providing the Union notice and opportunity to bargain about such subcontracting. In these respects the contract is distinguishable from *Allison Corp.,* 330 NLRB 1363 (2000)[3] in which the management rights clause explicitly gave the employer the exclusive right to subcontract and *Good Samaritan Hospital*, 335 NLRB 901 (2001) in which the contractual waiver was also very explicit.

I also conclude that the Union did not waive its right to bargain over the contracting out of all bargaining unit work by virtue of the past practices of the parties. Unlike the November 2011 lay-off, the lay-off of the housekeeping employees in January 2010 did not entail the replacement of unit employees with contractor employees. Moreover, the management rights clause of the parties' collective bargaining agreement explicitly gives Respondent the right to

[3] In *Allison Corp.,* the Board found that Respondent violated the Act in failing to bargain over the effects of the lay-off. In the instant case, failure to bargain over the effects is not alleged as a violation in complaint and there the Union never requested effects bargaining, as was the case in *Allison*.

lay-off employees for lack of work; it does not extend this right to subcontracting their work to the employees of a subcontractor.

The lay-off of Respondent's laundry employee and replacement by a contract employee also does not support a finding of waiver. This is so because Respondent did not notify the Union that it was transferring the work of the unit employee to a subcontractor.

Conclusion of Law

Respondent violated Section 8(a)(5) and (1) by unilaterally subcontracting the work of all bargaining unit employees without giving notice and an opportunity to bargain with the Union, terminating the two remaining bargaining unit members, refusing to bargain for a successor contract and withdrawing recognition of the Union.[4]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having illegally discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Patrish, LLC, doing business as the Northwest Airport Inn, St. Ann, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[4] At page 7 of its brief, Respondent argues that the complaint should be dismissed because this matter should have been handled through the grievance and arbitration provisions of the parties' collective bargaining agreement. However, deferral to arbitration is not appropriate in a case such as this in which the Employer had terminated the bargaining relationship, *Avery Dennison,* 330 NLRB 389 (1999).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Failing and refusing to bargain with the Union regarding: a successor collective bargaining agreement; subcontracting the work of bargaining unit employees; terminating the bargaining unit employees and replacing them with subcontractor employees thus eliminating the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, restore the bargaining unit positions and offer reinstatement to Tamera Poetting and Gary Wohldman.

(b) Make Tamera Poetting and Gary Wohldman whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement: All housekeeping employees, including inspectress and houseman, employed by Respondent at its St. Ann, Missouri facility.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its St. Ann, Missouri facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are

6 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 21, 2011

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 24, 2012.

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Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT subcontract bargaining unit work to subcontractors and terminate bargaining unit employees without giving timely notice and an opportunity to bargain to UNITE HERE Local 74.

WE WILL NOT refuse to bargain with UNITE HERE Local 74, as the exclusive bargaining representative of all our housekeeping employees, including inspectress and houseman employed at our extended stay hotel in St. Ann, Missouri, with regard to a collective bargaining agreement to succeed the agreement that expired on November 29, 2011.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL, within 14 days from the date of this Order, offer Tamera Poetting and Gary Wohldman full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. WE WILL terminate our contract with Southside Temporaries if necessary to accomplish the reinstatement of these employees.

WE WILL make Tamera Poetting and Gary Wohldman whole for any loss of earnings and other benefits resulting from their termination, less any net interim earnings, plus interest compounded daily.

PATRISH, LLC, d/b/a NORTHWEST AIRPORT INN

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1222 Spruce Street, Room 8.302, Saint Louis, MO 63103-2829

(314) 539-7770, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7780.